# RULE-CENTRISM VERSUS LEGAL CREATIVITY: THE SKEWING OF LEGAL IDEOLOGY THROUGH LANGUAGE

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This paper takes as an example of Anglo-American legal ideology the work of legal philosopher H.L.A. Hart, analyzing it in light of current linguistic theories. Linguists have proposed that ideological reflection can be affected in particular ways by the structure of the language used to convey it. We find that Hart's theory, with its emphasis on decontextualized rules and prerequisite conditions, fits the linguistic predictions. The paper concludes with the suggestion that the effect of language structure on cultural and/or legal ideologies is, however, socially and culturally circumscribed.

The notion of law as a system of rules has been a central concept for many Western legal theorists. These theorists tend to objectify ongoing social processes, depicting them in static, decontextualized terms. Our project is to outline how this objectification in legal theorizing is in part a result of the structure of language. We find the parallel tendencies toward objectification in Western legal and linguistic ideology predictable from a "drive for reference," a characteristic of linguistic structure. While the particular form this "drive for reference" takes in Western society must ultimately take into account the Western social context as well, we focus here only on the relationship between linguistic structure and legal ideology. Our analysis will concentrate on the work of H.L.A. Hart, a prominent legal philosopher of our time, whose concept of law as rules exemplifies the tendency to treat social process in a static, decontextualized manner.

It is our thesis that Hart's treatment of rule and process evidences a bias in favor of what linguists call "reference and

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predication" or the "semantic" aspect of speech—that aspect which can be analyzed apart from the social context of speaking. Some have argued that such a bias, found also among linguistic philosophers, is predictable from the very structure of language (cf. Silverstein, 1979). In other words, the use of language as a vehicle for ideological reflection tends to shape such reflection in predictable ways.[1] Not surprisingly, this kind of skewing is most evident in areas where linguistic regimentation makes itself most felt—a maximally textual area such as jurisprudence (*writings* about law) being a prime example.[2] In the case of legal ideology, an emphasis on reference and semantics leads to an overriding concern with rules as central to the routine functioning of the law. (Hart actually goes further, locating even the source of *change* in a legal system in legal rules "of change" rather than in social and legal practices—although he concedes that it is "at the fringes," where the system is changing, that process plays its part.) Yet even the seemingly routine "application" of rules to facts involves a creative moment, so that the notion of "applying rules" is itself evidence of the bias outlined above. We will use the term "legal creativity" to refer to a view that stresses, by contrast, the non-deductive, creative aspect of law even in its routine functioning.

The bias we have described is not Hart's alone. Indeed, it seems to be inherent in the way lawyers talk about law. The word "law" is often equated with the "rule" half of the "rule" versus "fact" opposition, as when judges in bench trials prepare findings of *fact* and conclusions of *law*. Similarly, juries find *facts* but are instructed by the judge with respect to the *law*. But "law" also has a generic meaning, which cuts across the "rule"-"fact" distinction,[3] for lawyers practice "law" when they examine witnesses, argue to the jury, prepare wills, negotiate joint venture agreements, or engage in a myriad of other

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[1] We should note at the outset that our use of the word "ideology" is in no way pejorative but simply designates one kind of cultural thought.

[2] The dimension of textuality becomes increasingly important as we come to developed texts with internal cohesiveness and structure, so that this internal "texture" actually shapes or regiments the discourse in certain ways (see Halliday and Hasan, 1976; Silverstein, 1984).

[3] This dual sense of the word "law" was noted, as Dworkin (1977) reminds us, by Roscoe Pound (1954), who attributed the general conflation of "law" with "rules" to a peculiarity of the English language: in English we use "the law" to refer to "Law" in the generic sense, while "a law" designates a *rule* of law. Thus, the same lexical item, "law," may be used for both cases in English, where many other languages use distinct words (as with *loi* and *droit* in French, for example).

activities. The generic meaning of "law" thus includes a consideration of practice as well as of "rules."[4]

We would argue, then, that any attempt to answer the question of "What is law?" must give significant weight to legal processes as well as to legal rules (see also Comaroff and Roberts, 1981; Moore, 1978), including the "categorizing" or "constitutive" rules that link other legal rules with actual events and processes. But to acknowledge the importance of social context and processes in constituting the law casts serious doubt on the possibility of an analytic philosophy of "Law" in general. That is to say, if particular social contexts are critical to the structure and nature of legal systems, jurisprudence must ground itself in particular cultural and historical contexts. It must study the "law" of particular peoples rather than the "Law" as an abstract reality to be discovered apart from specific contexts. This last point, while perhaps controversial for the legal philosopher, is of course quite familiar to the legal anthropologist.

We distinguish three distinct analytic levels in this study.[5] The first level treats events—the ongoing processes by which social life constitutes itself. The second level treats how human beings conceptualize their social life and interactions; included in this level are both rules and social "facts." We view rules as attempts to conceptualize ongoing social events or processes, but in static terms. Social "facts" are conceptualizations of the end products of social events and processes—for example, the "marriage" that results from the ongoing event wherein men and women "say their vows." Rules *about* the marriage process, then, are static attempts to generalize about the ongoing event, whereas the social "fact" of marriage is a static sociocultural conceptualization of a frozen end product of process. These conceptualizations serve at once as "models of" action and "models for" action (see Geertz, 1973). Thus, a cultural conception regarding "marriage" is at once a summary of how marriage has operated in our culture ("model of") and a blueprint for future marriages, because members of our culture have this concept of "marriage" as a guide for future behavior ("model for"). A third level of analysis treats the scholars—here, legal philosophers—who attempt to study both events and sociocultural conceptualizations of those events, and who

[4] Indeed, some scholars have questioned whether "rules" are of any real importance in most "legal" interactions (Daniels and Hayden, 1984).

[5] Here our discussion owes much to suggestions made by John Lucy.

comment upon the work of other scholars. We, then, are examining *Hart's study* of the first two levels—"events" and sociocultural conceptualizations of those events. Because we disagree with Hart, we will present our own view of those two levels.

This paper consists of three sections. The first section presents the textual evidence regarding Hart's disregard for context and process, noting a parallel bias in the work of the linguistic philosopher Searle. The section concludes with a brief discussion of changes through time, posing an historical contrast to the view that emerges from Hart's work. The second section furthers the contrast, using cross-cultural evidence to show that Hart's view is neither a necessary nor natural formulation (i.e., that it is in fact biased), and that consideration of examples from other cultures and eras would have helped to correct this model. A final section examines possible sources for Hart's bias and finds a basis in the structure of language itself.

## I. HART AND SEARLE

This section takes the work of Searle, the linguistic philosopher, and of Hart, the legal philosopher, as examples of Anglo-American linguistic and legal ideology. We will see that both of these men present biased perspectives when they elevate a concern for rules over process. In doing so their works evince similar underlying notions of rules, social "facts," processes, and the relations among these levels. In demonstrating that Hart and Searle are biased in similar directions, we also point out weaknesses in their fundamental theoretical distinctions.

An important aspect of the bias we will be discussing involves the distinction made by linguists between "presupposition" and "creativity." The contrast centers on the way in which speakers in the act of speaking point to elements of the context surrounding them. For example, phrases such as "this" and "that" direct attention to an object in the speech context; that object presumably exists whether or not the speaker acknowledges its presence. Thus, the utterance "that chair" *presupposes* the existence of a chair that can be pointed out, but the chair exists apart from the utterance. On the other hand, by using pronouns such as "we" or "they," speakers *in speaking* create a social group around them, including some members of the audience and excluding others. Presupposed

elements of the speech situation do not play the same kind of role; they do not fulfill a creative function.

The dividing line between creativity and presupposition is often not so neatly drawn. In many cases language combines these aspects—although to varying degrees (thus we speak of particular parts of speech as "relatively" more presupposing or creative). For example, to say "I promise you" is to *create* a promise or an obligation for the promisor. But in order that words should have this kind of effect, certain conditions must obtain: the words must be used by appropriate persons on appropriate occasions—that is, "by sane persons understanding their position and free from various sorts of pressure; those who use such words shall be bound to do the things designated by them" (Hart, 1961: 42-43). Linguists call these conditions "presupposed" because they are prerequisites to the meanings that are ordinarily attributed to specific language in specific contexts; as such they can be specified in advance and are knowable apart from the spontaneous creativity of ongoing social events. In everyday speech the existence of such conditions and their appropriateness are ordinarily assumed implicitly. Legal rules often state these conditions explicitly; hence, in discussing legal examples we shall call them "prerequisite" conditions. We see, then, that a successful promise combines both presupposed (or prerequisite) and creative aspects of speaking. It should follow, then, that an analysis of promises, and similar uses of speech, would include both aspects. Interestingly, though, we find that many analysts fail to do justice to the creativity of speech, concentrating instead on presupposed or prerequisite elements of the speech situation. This paper examines why this occurs.

In *The Concept of Law*, Hart (1961) analyzes law in terms of primary rules, which he terms "rules of obligation," and secondary rules, which are rules about rules. The second class of rules includes rules of recognition, change, and adjudication. Rules of change may be either private or public power-conferring rules; for example, rules relating to the power to make wills or contracts are private power-conferring rules, while rules specifying the powers of judges are public power-conferring rules. In *Speech Acts*, Searle (1969) distinguishes regulative rules (governing behavior that exists independent of the rules) from constitutive rules (rules that depend on other rules). As we shall show, what Hart means by primary rules of obligation is what Searle means by regulative rules. Further, Hart's examples of secondary power-conferring rules are (at

the level of law) what Searle specifies as the contextual conditions of constitutive rules (at the level of speech acts). Unlike Searle, however, Hart does not conceive of constitutive—or, in Honore's (1977) terminology, "categorizing"[6]—rules as definitions connecting particular legal facts with general categories.[7]

Searle begins by saying that "regulative rules regulate . . . independently existing forms of behavior; for example, many rules of etiquette regulate inter-personal relationships which exist independently of the rules" (1969: 33). In contrast, constitutive rules do not merely regulate; they create or define forms of behavior. The rules of football or chess, for example, do not merely regulate playing football or chess; without them there would be no possibility of playing such games. The activities of playing football or chess are constituted by acting in accordance with (at least a large selection of) the appropriate rules. Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules, in Searle's account, constitute (and also regulate) an activity the existence of which is logically dependent on the rules.

It is characteristic of constitutive rules that they can be stated as "X counts as Y in context C" or that they are part of a system of rules some of which can be so stated. The latter possibility means that the formula is not a definitive test for constitutive as opposed to regulative rules. In some cases, the system in its entirety must be "read" as a constitutive rule:

> Thus, though rule 1 of basketball—the game is played with five players to a side—does not lend itself to this form, acting in accordance with all or a sufficiently large subset of the rules does count as playing basketball (Searle, 1969: 36).

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[6] When not discussing Searle's concepts, we prefer to use Honore's (1977) term "categorizing" for these defining rules which link particular event and general type, because unlike Searle we believe that such rules are not in themselves "constitutive."

[7] Doing so might have led Hart to an examination of the crucial underlying social process by which particular events become classed as instances of wider social/legal types. Categorizing rules, when recognized as formulae that attempt to render this process in static form, can provide a starting point for the study of social process in the law—especially because such static ideological formulations may themselves enter into that process, as when lawyers explicitly argue over the applicability of a specific categorizing rule in any particular case. (Searle, of course, did not give process adequate recognition either, choosing to emphasize instead a "constitutive" role for *rules*. But he did at least take the first important step, locating the place of these "constitutive" or categorizing rules in the overall system.)

To say that X counts as Y is not merely to apply a label to a particular kind of situation (as with "offside," "checkmate," etc.); rather, such a specification has definite implications ("penalties, points, and winning and losing") that are essential features of the situation in question.

Searle makes a further distinction between regulative and constitutive rules:

> where the rule is purely regulative, behavior which is in accordance with the rules could be given the same description or specification (the same answer to the question, what did he do?) whether or not the rule existed . . .
> . . . Where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist (Searle, 1969: 35).

Searle argues that it is difficult to see how a constitutive rule can be violated—how one can violate the rule as to what constitutes a touchdown in football or as to what constitutes a contract. One can fail to score a touchdown or to create a valid contract, but this is hardly a violation of the rule. Hart (1961: 35) makes a similar argument in contrasting the provision for nullity in the case of secondary power-conferring rules (for example, when promises that would otherwise constitute a contract do not satisfy legal requirements as to form) with the sanctions of the criminal law (primary rules of obligation).[8]

Searle then contrasts institutional facts with brute facts. The idea here is that a "reality" consisting of brute facts exists outside of individuals. Searle's model for systematic knowledge of such brute facts is the natural sciences. But even the "facts"

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[8] Hart also uses the game analogy in *The Concept of Law* (1961) and even more explicitly in his article "Definition and Theory in Jurisprudence" (1954), in which he refuses to identify the meaning of the word "right" with any physical or psychological fact. Instead he compares it to words such as "out" in cricket or "trick" in a card game. He points out that statements using such words presuppose the existence of a system of rules for the conduct of the game as well as the applicability of a particular rule covering the situation in question: "legal words can only be elucidated by considering the conditions under which statements in which they have their characteristic uses are true" (1954: 60).

Nevertheless, the game analogy can be misleading. Among its limitations is the fact that games are bounded, e.g., games do not depend upon other games. Baseball is independent of chess. Institutional "facts," on the other hand, are related to one another. Economic, political, and legal institutional facts are not independent. Indeed, law is the ongoing in-action process by which legal institutional facts come to be interdefined with economic and political institutional facts. In general, however, the game analogy seems to hold up rather well, not because institutional practices are games, but rather because games are a kind of institutional practice.

of natural sciences are institutional rather than brute facts, for it is well known how socially circumscribed scientific observations often are (cf. Bakhtin, 1981: 351). Indeed, we would argue that all sociocultural systems and products have a social genesis, denying that there is a split between the "basic" and the "socially-fabricated" parts of society.

However, we can agree with Searle that the study of legal systems is at the institutional as opposed to the brute level:

> A marriage ceremony, a baseball game, a trial, and a legislative action involve a variety of physical movements, states, and raw feels, but a specification of one of these events only in such terms is not so far a specification of it as a marriage ceremony, baseball game, a trial, or a legislative action. The physical events and raw feels only count as parts of such events given certain kinds of institutions.
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> Such facts as are recorded in my above group of statements I propose to call institutional facts. They are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. It is only given the institution of marriage that certain forms of behavior constitute Mr. Smith's marrying Miss Jones. . . . These "institutions" are systems of constitutive rules. Every institutional fact is underlain by a (system of) rule(s) of the form "X counts as Y in context C" (1969: 51).

Thus, for Searle, rules that tell us what contextual features and what legal discourse together count as a marriage ceremony, a trial, a legislative action, etc. are constitutive. The facts that "Smith married Jones," "Green was convicted of larceny," "Congress passed an appropriations bill," or this is a five dollar bill are institutional facts whose meaning depends upon the existence of rules that define the institutions presupposed by these facts.

If we return to Searle's formula for constitutive rules, we can now see that it collapses a distinction between two different kinds of context, the situational and the institutional. By situational context we mean the actual situational conditions required for a particular X ("I bequeath") to be subsumed under category Y (a bequest). The conditions for a valid bequest or will, for example, may require that it be in writing, signed, and witnessed by three witnesses. By institutional context we mean the larger context which in Searle's account includes the other rules of the game; we would expand this notion further to include other legal and social rules and practices upon which the meaning of Y depends (in this case,

for example, rules of the internal revenue code relating to estate taxes). Thus, we can restate Searle's formula as follows:[9]

> X (a situational fact) in context s (a situational context) counts as Y (an institutional fact) in context i (an institutional context)

In this revised formula X is an instance of Y (which is an institutional fact). If X is a specific act, like the utterance of a promise for example, Y is a social formulation that categorizes certain utterances as promises and so allows X to be recognized as such. The institutional context determines the meaning and consequences of X having been effectively spoken or written, so that in a legal institutional context, the consequence of an effective promise when exchanged with another promise may be that a contract has been entered into. The situational context, on the other hand, sets the terms under which the utterance can be an effective promise, i.e., whether the promisor is of age, competent, etc.[10] In the semiotic vocabulary, X and Y are in a "type"-"token" relation (following Peirce, 1931), which is one in which the type-level classification Y is only realized in actuality through particular tokens (X).

Searle's formula for constitutive rules deals with ongoing events at the level of social process only as they are frozen or typified as kinds of institutional "facts." Insofar as legal rules of this kind operate in this way, Searle has captured a key facet of the cultural linking of process and rule. But it is important to realize that the idea of "institutional facts" itself is a cultural representation which shapes the view of reality it presents. The dollar bill, for example, contains on its face a constitutive rule: "This note is legal tender for all debts public and private." But it is the use of money in a particular social/historical context that gives meaning to both the constitutive rule and the institutional "fact" of legal tender. Thus, while Searle would say that "constitutive rules" give meaning to "institutional facts," we would prefer to say that the meaning of both "constitutive rules" and "institutional facts" is rooted in social process.[11]

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[9] We are indebted to Richard Parmentier for suggesting this reformulation.

[10] In Searle's formula, X can be understood either as the utterance of a speech or written action, or as the doing of a physical action. While Searle is interested in speech actions, it is clear from his examples that the formula applies to physical or particular instances of actions as well. Tagging the runner with the ball counts as "out" in a baseball game.

[11] The word "constitutive" is used by the theorists we discuss in three distinct ways: (1) Searle and Hart both use "constitutive" to mean "socially creative," as when Searle notes that a constitutive rule "creates the possibility

Searle thus posits a division between regulative and constitutive rules that turns on 1) the degree to which they are socially creative and defining and 2) the result that obtains when a rule is breached (nullity vs. sanction). Thus, regulative rules do not create institutional facts but open up violators to sanctions, while constitutive rules prescribe means for creating institutional facts but when breached result merely in the absence of any new creation rather than in sanctions. Searle also hypothesizes that speaking is generally an act performed according to constitutive rules (1969: 37) and that speech acts such as promises, orders, agreements, and warnings are institutional facts that derive their meaning from such rules. His analysis focuses on the promise—in particular (see Chapter 3), on the "context C" conditions that must obtain in order for the words "I promise . . . " (X) to count as a valid promise (Y).

There are several parallels between Searle's formulation and the theory of law proposed by Hart.[12] First, both scholars view the linguistic/legal systems that they seek to understand as essentially rule-governed. Second, both Searle and Hart divide the rules governing language or law into two basic groups, distinguished by similar criteria. Thus, both Searle's regulative-constitutive rule split and Hart's division between primary rules of obligation and secondary power-conferring rules depend in part upon the distinction between nullity and sanction and in part upon notions of social creativity. Finally, both theorists focus on the promise as their primary example or metaphor. This fortunate coincidence affords a particularly good basis for a direct comparison of the two men's approaches.

Hart's point of departure is a critique of the legal philosopher Austin, whose work relied on an analogy between rules of law and orders backed by threats. Hart argues that this analogy obscures an important distinction between two different kinds of rules, the union of which makes up "the heart of a legal system" (1961: 95):

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of new forms of behavior" (1969: 35; see also Hart, 1961: 75); (2) Searle in particular conflates this first notion (constitutive = creative) with a second (constitutive = defining), so that his "constitutive rules" at once *create* and *define* (see Searle, 1969: 33; a similar confounding is found in Hart); (3) Honore (1977: 114) speaks of the "*constitutive* elements of contracts, wills," etc.; here "constitutive" means "parts of a whole." We believe that Searle's "constitutive rules" (or Honore's "categorizing rules") fill only the second, "definitional" function. We reject Searle and Hart's claim that they fill a "creative" function.

[12] Searle, however, is arguing at the level of particular instances of speech acts, while Hart deals with the role of constitutive rules at a broader institutional level.

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions. . . . Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways . . . control their operations (1961: 79).

Hart's distinction between primary and secondary rules is, however, a complicated one. Tapper (1973) was able to find eight different criteria which Hart used to distinguish the two kinds of rules. One criterion, which Tapper saw as critical in defining primary as opposed to secondary rules, is "the contrast between duty imposing and power-conferring rules," which "is a most important aspect of the distinction between primary and secondary rules, and one to which Hart constantly reverts" (Tapper, 1973: 249).

For our purposes, however, two other distinctions between primary and secondary rules are of more immediate interest. They are "whether the effect of non-compliance is a penalty or invalidity" (Tapper, 1973: 249) and whether a rule merely describes behavior rather than creating or defining it.

First, let us examine the "nullity-sanction" split, which we have already considered in the context of Searle's regulative-constitutive divide. Hart argues that while primary rules, as exemplified by the criminal law, might resemble Austin's "orders backed by threats" in that they are indeed backed by sanctions, secondary power-conferring rules cannot be so typified:

> In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it. . . . We can . . . subtract the sanction and still leave an intelligible standard of behavior which it was designed to maintain. But we cannot logically make such a distinction between the rule requiring compliance with certain conditions, e.g. attestation for a valid will, and the so-called sanction of "nullity." In this case, if failure to comply with this essential condition did not entail nullity, the rule itself could not be intelligibly said to exist . . . the provision for nullity is *part* of this type of rule itself (Hart, 1961: 34-35).

Like Searle's constitutive rules, Hart's secondary power-conferring rules lay out the presupposed requirements that must be met in order for a particular result to be achieved.

Failure to meet these requirements simply means that the new legal or social reality is not created; a "nullity" ensues.

Intertwined with the notion of "nullity" is the idea that secondary power-conferring rules, when successful, create and define a new reality which could not exist independently of the rule. Thus, the rule is intrinsically linked to the social result reached. This socially creative/defining aspect of secondary power-conferring rules is explicitly acknowledged:

> where the sovereign person is not identifiable independent of the rules, we cannot represent the rules . . . as merely the terms or conditions under which the society habitually obeys the sovereign. The rules are *constitutive* of the sovereign, and not merely things which we should have to mention in a description of the habits of obedience to the sovereign (1961: 75).

Thus Hart, like Searle, defines his second kind of rule both in terms of "nullity" and as "constitutive" (here meaning "socially creative/defining").

But there is an important difference between these two notions. A "nullity" is said to result when a required contextual condition of a constitutive rule has not been met. When Hart says that the rules are "constitutive" of the sovereign, however, he is speaking of the "constitutive" or "categorizing" rules themselves, which, together with practices such as coronation in the case of a king or constitution framing and legislative practices in the case of a republic, define, describe, and create the sovereign.[13]

However, Hart's primary rules—or Searle's regulative rules—are also "constitutive" in the sense that they operate together with social action or process to define social realities:

> Thus Hume crisply and concisely observes, "It is impossible for men so much as to murder each other without statutes." Rawls takes the same stand in classifying alike as rules of practices both the definition of an office and an offence, though in Hart's terms the former would be a secondary rule and the latter a primary . . . it is just as much the case that rules are necessary to transform killing into murder as

[13] While we would differ with Hart as to where the creativity lies (that is, we would consider social process rather than attributing creative force to rules alone), we would certainly agree that these rules give a definitional framework which situates people, places, and events within a socio-legal context. In other words, we would view such rules as "defining" but not "creative" (see note 11). We would agree that without such a definitional contextualization, notions such as "sovereign" are meaningless.

> that they are necessary to transform promising into contract (Tapper, 1973: 257).

Thus, while we might be able to distinguish between primary and secondary rules using the "nullity" vs. "sanction" criterion, we cannot do so using the "socially creative/defining" criterion. For this reason, it is important that we distinguish between "constitutive rules" as rules that when disregarded result in nullity, and "constitutive rules" as rules that provide sociocultural definitions (murder) for what would otherwise be "brute" events or actions (killing). Such defining rules are, in effect, formulae that allow ongoing events to be translated into social categories. They tell us that an action (X) is an instance of a specific type (Y), within both a situational and a social-institutional context. Because every event must be so translated in order to have legal significance, the fact that a rule serves this function does not help us to distinguish between primary rules of obligation and secondary power-conferring rules.[14]

We can examine the parallel between Searle's constitutive rules and Hart's secondary power-conferring rules more closely using their common example, the promise. Hart tells us that "an elementary form of power-conferring rule also underlies the moral institution of a promise":

> To promise is to say something which creates an obligation for the promisor: in order that words should have this kind of effect, rules must exist providing that if words are used by appropriate persons on appropriate occasions (i.e., by sane persons understanding their position and free from various sorts of pressure) those who use these words shall be bound to do the things designated by them. So, when we promise, we make use of specified procedures to change our own moral situation by imposing obligations on ourselves and conferring rights on others; in lawyers' parlance we exercise "a power" conferred by rules to do this (Hart, 1961: 42-43).

As noted earlier, the rules that, according to Hart, determine when an utterance constitutes a promise are implicit in ordinary discourse but are made explicit in the law (in Hart's example, "by sane persons understanding their position and free from various sorts of pressure"). Such necessary

[14] Searle's distinction between "brute" and "institutional" facts and Hart's divide between "external" and "internal" points of view both seek to emphasize the fact that social events (whether linguistic or legal) receive cultural interpretations, so that consideration of this interpretive level (the institutional level or the internal point of view) is necessary to understanding how law and language work.

conditions for subsumption under a legal category are what we have called the prerequisite or contextual conditions of constitutive rules. They are important in Hart's initial discussion contrasting power-conferring rules with the primary rules of Austin's model:

> Thus *behind* the power to make wills or contracts are rules relating to capacity or minimum personal qualification (such as being adult or sane) which those exercising the power must possess. Other rules detail the manner and form in which the power is to be exercised, and settle whether wills or contracts may be made orally or in writing, and if in writing the form of execution and attestation. Other rules delimit the variety, or maximum or minimum duration, of the structure of rights and duties which individuals may create by such acts-in-the-law. Examples of such rules are those of public policy in relation to contract, or the rules against accumulations in wills or settlements (1961: 28; emphasis added).

Here again, Hart's examples of rules relating to the power to make wills or contracts specify the contextual conditions for spoken or written practices (X) to count as an institutional fact (Y) in Searle's formula. Rules relating to "capacity or minimum personal qualification" or to the "manner and form in which the power is to be exercised" (Hart, 1961: 28) are prerequisite situational (context s) conditions. Those delimiting "the variety, or maximum and minimum duration, of the structure of rights and duties which individuals may create by such acts-in-the-law" (Hart, 1961: 28) are part of the institutional (context i) limitation.

Like Searle, Hart recognizes that the act of promising is socially creative (it "creates an obligation"—1961: 42). But, even more than Searle, he focuses on the presupposed or prerequisite conditions that must be met in order for this act to "go through." As we noted, Searle analyzes the *performance* of an utterance (X) as well as the contextual (context s) conditions that must exist if that utterance is to "count as" a promise (Y). But Hart's discussion of rules conferring the power to make wills or contracts concentrates entirely on prerequisite contextual conditions rather than on rules, such as Searle's "constitutive" rules, that specify a formula to be performed, or on rules that actually confer power (in the case of wills or deeds, for example, rules that permit the alienation of property by bequest or conveyance). Thus Searle's formula at least recognizes a link between process-level events (X) and their typification at the Y-level; Hart does not explore this link

because he focuses on the contextual conditions that are merely prerequisites of this process.

The absence of a link between rule and process in Hart's work may account for his locating change in *rules* of change, that is, in public and private power-conferring rules, rather than in legal and social processes or practices: "The remedy for the *static* quality of the regime of primary rules consists in the introduction of what we shall call 'rules of change' " (Hart, 1961: 93). Hart acknowledges that in an imaginary less complex society:

> The only mode of change in the rules . . . will be the slow *process* of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse *process* of decay, when deviations once severely dealt with, are first tolerated and then pass unnoticed (Hart, 1961: 90; emphasis added).

Hart, of course, knows that social processes lead to changes in legal rules in modern societies as well. And he also knows that in judicial proceedings,

> Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit inherent in the nature of language, to the guidance which general language can provide (1961: 123).

This analysis applies to constitutive rules as well. Indeed, if one were to look more carefully (and historically) at the way in which "particular fact-situations" come, in the most "routine" and "ordinary" everyday functioning of the law, to be classed under general rules, one would see that the act of classifying cases is one way in which changes in the wider social/institutional context come to affect the system of legal rules (Levi, 1949). Hart, because he confines his consideration of "institutional context" to the study of other legal rules, has no adequate analysis of this process of change. (Searle similarly limits his notion of "institutional context" to rules.) Hart deals with this difficulty by taking an analytic rather than an historical perspective, which allows him largely to avoid issues of legal change.[15] Instead Hart formulates the problem of change in terms of his rule-centric framework although he

[15] See his chapter on "Formalism and Rule Scepticism," where he discusses the relationship of rule and fact.

clearly recognizes that the study of legal change requires attention to process issues.

The final and most general point of similarity between Hart and Searle is their fixation on rules. Even in sections in which he is discussing process, Hart often slips into a deductive model of applying rules. Thus, he addresses the issue of "open texture" in the law within an assumed framework of established *rules* that are to be applied (1961: 127-32).[16]

This concern for rules (and its limits) is perhaps most obvious in the closing statement to Hart's chapter on the relative importance of rule and process in the law:

> Thus before the decision of the Court of Criminal Appeal in Rex v. Taylor the question whether that court had authority to rule that it was not bound by its own precedents on matters concerning the liberty of the subject might have appeared entirely open. But the ruling was made and is now followed as law. The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation look more tidy than it really is. Here, at the fringe of these very fundamental things, we should welcome the rule-sceptic, as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law (Hart, 1961: 150).[17]

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[16] This rule-centered perspective shapes the very core of Hart's work, his discussion of the validity problem and the rule of recognition. These concepts are crucial to Hart's explanation of the foundations of a legal system: "The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is . . . an *ultimate* rule" (Hart, 1961: 104). Thus, Hart locates the key source of law in a rule of recognition by which legal rules "out there" are given validity. This overall model of deductively applied rules concentrates on validity, leaving the question of the efficacy of those rules (in Hart's own words) "presupposed" or assumed.

[17] There is a fundamental confusion in Hart's use of the word "rule" in *The Concept of Law*. As Black (1962: 109-15) reminds us, the word "rule" has several different possible meanings, and Hart does not distinguish among different senses of the word.

This paragraph affords a particularly good example of the problem; we can find three distinct meanings all coded by the word "rule": (1) when Hart speaks of the court having authority "to *rule*," or "the *ruling*" being made, he is talking about a culturally defined legal process, understood "from within"—that is, through the ideology held by the participants themselves; (2) when this process is complete, we have a different kind of "rule," as in the sense of "regulation"—a statically conceived end product of this ideologically informed process (hence, Hart's statement that the "ruling" will now be "followed as law"); (3) "rule" can also mean cultural and legal regularities regarding how courts should behave—this is what Hart means when he speaks of "the *rule*-governed operations" of the courts. This distinction between the last two

Over the vast center of the law, then, rules reign supreme. The instances in which application of rules is uncertain, where "open texture" prevails, where the in-action process creates the connection of fact and rule—or creates the rule itself—are rare, existing at the fringes. Thus, not only does Hart deal with the concept of "rule" by limiting creativity to secondary power-conferring rules (interpreted through prerequisite contextual conditions), but Hart's approach to the split between "rule" and "process" limits creativity even further, relegating it to the very fringes of the law.

We do not deny that laws are often not disputed in the practices that constitute the ordinary functioning of the legal system. Our argument is that the difference between ordinary and disputed practices can be better understood by contrasting "habitually followed" with "contested" laws as they operate in social contexts, rather than in terms of a "process and rule" dichotomy. Contrary to the rule-skeptics, we believe there may be a pattern to legal processes even "at the fringes," but, unlike Hart and other rule-centrists, we see in even the most routine application of a law a creative process. For example, as we pointed out earlier, it is the *use* of money that maintains and reconstitutes the institution of money as legal tender. This becomes apparent when the system fails, as in a runaway inflation when people refuse to accept paper "money" as payment.

We wish to stress two ways in which the ordinary functioning of the "vast, central areas of the law" involves creativity, when looked at from a semiotic standpoint. First, change in the legal system is not confined to dramatic discontinuities characterizable as "at the fringe." Rather, change frequently arises out of the routine creativity involved in common legal practices—a phenomenon that a rule-centric model would regard as mere "slippage" in the supposedly automatic application of rule to fact. Second, crucial to this

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meanings of "rule" is of particular interest, for in the one case we are dealing with an overtly stated "rule," recognized as authoritative in some way, while in the last case we are dealing with a regularity that need not be so recognized. Paradoxically, we cannot argue about the existence of the former kind of "rules" (these are Honore's "real laws"), although we can dispute the extent and nature of their influence; in contrast, if we speak of a regularity or pattern that can be observed apart from any conscious formulation, the question becomes not whether such a regularity actually influences behavior, but whether or not we can speak of the existence of an artificially constructed "rule" at the level of "deep structure" (as opposed to "surface structure," to use the terminology of linguists such as Chomsky) which would explain the overt pattern of behavior in question.

"routine creativity" is the act of categorizing particular events as legal types, an act that lawyers must perform in the most ordinary of uncontested cases and in routine office practice or negotiation. Whether or not the link between event and category is contested is beside the point; what is important is that every such link requires an intervening social process whereby events receive cultural/legal interpretation and definition (cf. Mertz and Weissbourd, 1985).[18]

Given a disputed situation, opposing lawyers marshall the "facts" so as to invoke competing rules, and they reason by example, citing competing chains of precedents. As Levi (1949) demonstrates, the common conception of law as *a priori* rules or principles consistently applied does not adequately capture "reality." Instead the process of applying rules within a changing social context itself changes the meaning of the rules in question. Consider Levi's example (1949: 17-20) of the long argument about the meaning of "inherently dangerous" in cases involving manufacturers' liabilities to consumers. The case-by-case specification of what was inherently dangerous resulted over time in a change in the basic meaning of the whole category. This process goes on not only in disputed cases but also in the everyday practice of the law in the law office. Hart's "fringe" of the law is thereby pushed rather close to the center. Levi's work demonstrates the key role of process and the ongoing influence of context in legal reasoning.[19]

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[18] Mertz and Weissbourd (1985) use semiotic theory to describe this kind of legal categorizing as an example of the "type/token" problem.

[19] Henry Maine makes a similar point in his *Ancient Law*:

> When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring (1972: 19).

Whenever a court reviews precedents, it is reviewing legal history. If one merely glances at a long enough period of legal history, it is evident that the most basic legal categories have changed in meaning. In A.M. Honore's terms, "the legal position of the dramatis personae and res, their possibilities of acting and suffering, and their mutual relations" have changed (1977: 112). For example, the meaning of property changed when land could be transferred by will or by conveyance and the restrictions of a system of life estates and primogenature thus circumvented. The meaning of "property" changed again when an emerging market economy increased the importance of gold and commodities relative to land and chattels, which had been the dominant forms of property in the earlier predominantly agricultural society.[20]

With the development of the laws of contract, negotiable instruments, and corporations the meaning of the category "property" changed once again. Stocks, bonds, mortgages, commercial paper, and other financial instruments have replaced gold and commodities as core kinds of property.[21] The modern world of finance and credit rests on written promises (promissory notes) and orders (bills of exchange, checks); the commercial and corporate world upon contract. Similar changes have occurred in almost all legal categories. Corporations, for example, have become persons, and when one is using another's computer time without permission, theft does not have to involve the carrying away of anything.

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Here Maine recognizes the preference in English legal thought for statically applied rules to be discovered "out there," and he realizes that this preference obscures the changes in the meaning of the rule that come with the addition of each new precedent. Like Levi, he also notes that this ideology does not do justice to the actual system. In both cases, we get a picture of the way in which, slowly and sometimes imperceptibly, incongruous precedents changing in accordance with ongoing social change accumulate to the point where the meaning of an old legal category must yield.

[20] This change was accompanied by the differentiation of the law of contracts from the law of property, thus creating an entirely new category of legal actions. The development of a full-blown contract law is of relatively recent origins. In Blackstone's second volume entitled *Rights in Things* (1854; see Chapter 33 under "of title by gift grant and contract"), fewer than 40 pages are devoted to contract, sales, bailment, money lent at interest, debt, bills of exchange, promissory notes, and shares in public companies.

[21] These spoken or written acts are what linguists call performatives (i.e., "I promise, order, agree, offer, accept," etc.), all of which name the event they create (see Benveniste, 1971). These are the pure forms of the examples Searle and Hart used when discussing constitutive or power-conferring rules and institutional facts. (Words such as "bequeath" and "convey" are similarly performatives and approximate closely the pure performatives discussed above.)

Even the relation between legal actors has changed. While we use the same terms, i.e., rights, powers, and obligations, to describe status relations as we do for contractual ones, the special rights, powers, and obligations that define statuses differ from general rights, powers, and obligations, which apply to everyone. Compare, for example, the early law of master and servant with the law of contract applicable to a collective bargaining agreement. Not only has contract law become relatively more extensive and important, but the content of both status and contract categories dealing with relations among persons has changed dramatically.

In short, the continuous use of the same terms for basic categories of law, i.e., persons, property, powers, and obligations, tends to conceal the dialectic of rule and process through which changes in the law occur and fosters the illusion that the law is a static system of rules deductively applied. An historical view is necessary in order to understand how through this dialectical process law both reflects and creates economic, political, and other social changes.

## II. CROSS-CULTURAL CONTRASTS

Thus far, we have followed Hart and confined our attention to the Anglo-American legal system. However, our analysis of the creative element in ongoing legal processes applies more generally. Indeed, by looking at the legal ideologies of other cultures, we can better appreciate the extent to which Hart's analysis is rooted in a particular cultural ideology rather than in some logical necessity. Where Hart's model, like that of other Anglo-American legal theorists, concentrates on rules deductively applied and upon rules specifying prerequisite elements of situations, the ideologies of other cultures give more weight to creativity in the language of the law and even to the ongoing force of rhetoric itself.

In Moroccan law, for example, the context of the speech situation is of great importance.[22] As Lawrence Rosen (1981) describes the courtroom situation, the form of the ongoing discourse is at least as important as its content. Thus, the judge, or *qadi*, considers contextual factors such as the appearance, intensity, style of speech, and gestures of the litigants in forming opinions of cases. In contrast to the Anglo-American system, with its emphasis on order and formal

[22] Indeed, written language is not viewed as an adequate substitute for spoken language.

sequences of question and answer, discourse within the Moroccan courtroom is largely unconstrained and open to manipulation by litigants. To a Western observer it seems that chaos reigns as many participants speak at once:

> [The *qadi*'s] first substantive question is usually the signal for the shouting to begin. The parties begin by talking to the *qadi* but often end by addressing the aide, the clerk, others crowded into the courtroom, and even a stray anthropologist (Rosen, 1981: 228).

Even after one speaker has won the floor, his or her opponent frequently interrupts. This freedom of form extends to exchanges between litigant and *qadi*:

> In court, litigants will often use this style [a kind of Socratic dialogue] with the judge. Accused of beating his wife, a man may say to the judge, "Is she not a woman? Doesn't the Quran say a man is the 'governor' of a woman? Is it not shameful for a woman to say these things to a man?" At each point he seeks to get the *qadi* to affirm his statement in the presence of others, just as he might in his ordinary social discourse (Rosen, 1981: 231).

Thus, the sort of formality and constraint of discourse that typifies Western courtroom dialogue is not found in the Moroccan case.

The contrast between Anglo-American procedures and the form of discourse in Moroccan courts can be attributed to different views of creativity in law and language and of the relative importance of contextual variables. The modern Anglo-American ideology calls for minimizing contextual difference, so that differences in social class (which can be evidenced in speech, dress, gesturing styles, etc.) should not affect court decisions. Thus, litigants in courts are described as "plaintiffs" and "defendants," rather than as particular, and different, individuals.[23] The Moroccan system, on the other hand, relies upon situational cues as indices of the truth:

> Almost invariably, the plaintiff will be interrupted midway by the defendant, and both parties will begin to argue with one another. When asked, most *qadis* say that they want to see the two parties interact and want to gauge the intensity of their attachment to the

[23] It could be argued that the ideology not only asserts that such differences *should* be unimportant, but that it shapes perceptions so that such differences, at times, are given less importance than in other systems. Berger and Luckmann (1967) make this point with regard to cultural "psychology": if a certain model of psychological processes, like Freud's, becomes popular, individuals may come to interpret their feelings and reactions in terms of this model, which then becomes at once a "model of" and a "model for" (see Geertz, 1973).

> issue. . . . In short, for the *qadi* the "facts" are estimations of character assumed by background and displayed by courtroom encounter (Rosen, 1981: 231).

Thus, Moroccan legal ideology assumes that important clues to "what actually happened" lie in the actual form of ongoing discourse as well as in its content. Where the Anglo-American view attempts to decontextualize argument, assuming that context-specific factors only blur or prejudice some context-free, presupposable truth, the Moroccan view is that the courtroom should not remove litigants from the normal context of interpersonal interaction.[24] Thus, the more closely speech within a Moroccan courtroom can approximate ordinary, everyday speech, the less litigants can manipulate "the truth." Truth is seen as emerging *from process*, from the ongoing, creative use of language, from the forms and uses of speech itself.[25]

This notion of a context-dependent truth resembles the Old Testament story in which Solomon judged between two women, each of whom claimed to be the mother of a certain child, by offering to cut the child in half and give one half to each woman. The "real" mother abandoned her claim rather than see her child killed and then found she was awarded the child. Solomon judged the case not on the semantic content of the women's testimony but on their behavior as he observed it in context. Indeed, our common assumption that the "real" mother in this case was the biological mother (a static, decontextual notion of motherhood) may well reflect the very bias at issue here; in fact, Solomon's test only revealed which woman cared most for the child. Her action in the courtroom made this woman the "real" mother, defined in a creative, contextual way (that is, as the woman who *showed* herself to be the better, more caring guardian).

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[24] We are not saying that the Anglo-American system *actually* eliminates pragmatic or contextual factors. On the contrary, we are insisting on the importance of process throughout the system. Here we are speaking only of the *ideology*.

[25] The Moroccan system has an appellate procedure in which pragmatic or contextual elements become less important. But one of the ultimate appeals within the legal system involves the taking of a "holy oath" to demonstrate that a litigant is speaking the truth—again, a pragmatic, context-based procedure (Rosen, 1981: 226). This "holy oath" is such a decisive measure of "truth" that only once in the history of the court Rosen studied did litigants with conflicting stories both take the oath (Rosen: pers. comm.). This conflict was unacceptable; the case was thrown out. The point is not that Moroccan legal ideology focuses solely on contextual factors, but that such factors play an important role in how the system is conceived.

A similar emphasis on the contextual[26] force of language can be found in some Tswana disputes, as analyzed by Comaroff and Roberts (1981). On the one hand, some Tswana cases, which Comaroff and Roberts label type 1 and type 2, occur within established relationships; values rather than relations are at issue. Examples of such cases include the disputes that arise when one man's cattle destroy a neighbor's crop or when a son tries to claim a house that his father has promised to give him. In these cases, the body of societal norms, which the Tswana call *mekgwa le melao*, have such intrinsic force that the decision is generally not problematic; the cases are viewed as "open and shut" (Comaroff and Roberts, 1981; 116-20, 234-40). However, there are two other categories of cases, Comaroff and Roberts' type 3 and type 4, which both involve negotiation of relations in which the course of argument itself plays a critical role in defining social outcomes:

> Cases of types 3 and 4 . . . take two forms: either one party seeks to transform a social linkage while the other does not, the latter therefore arguing that the dispute ought properly to concern a specific incident or interest within the context of an existing bond; or both may engage in the effort to impose a definition on that bond, but in different ways. Whichever form they take, disputes of these kinds hinge on the interpretation, and the reduction to order, of a range of events. Rhetorically, they demand a construal of the history of interaction between the litigants (1981: 235).

In such cases, skill in rhetoric becomes an important factor, and ways of speaking may be at the core of the dispute.

Comaroff and Roberts note that the apparent dualism—between cases in which norms determine outcomes and cases in which the norms are themselves manipulated—reflects a larger world view of the Tswana, in which the universe "is seen to be both regulated by *mekgwa le melao* and yet pervaded by competitive individualism" (1981: 240). These two poles are not opposed but mutually interdependent and necessary. Social relations are seen as always changing, yet bounded by the principles of *mekgwa le melao*.

The fluidity of Tswana social relations translates into an emphasis on discourse in cases that are concerned with the nature of relationships (types 3 and 4). For example, in

[26] In linguistic terminology, such "contextual" force would be characterized as "pragmatic"; we here use the nontechnical term to avoid confusion.

disputes that arise over marriage relations, the speech of the parties becomes particularly important:

> the significance of rhetorical factors is very great. It is contingent on the Tswana concept of veracity, which derives from the assumption that social reality exists primarily in the manner in which it is constructed. There is no concrete set of social facts "out there" against which the truth value of words or propositions can readily be measured; veracity subsists, rather, in the extent to which events and interactions are persuasively construed and coherently interpreted (Comaroff and Roberts, 1981: 238).

The Tswana see all social facts as culturally constructed products of ongoing human speech interaction. Rule and process cannot be opposed in characterizing the Tswana system, for rule and process are inextricably interwoven in Tswana disputes. Rather than emphasizing the prerequisite, static aspects of law, the Tswana put the most weight on creative, contextualized interaction. Taken together, the Moroccan and Tswana cases suggest a rather different view from that which is at the heart of Anglo-American legal ideology. In both the Moroccan and Tswana cultures, the contextual and creative use of language is emphasized. Patterns of courtroom and other legal discourse are accepted as important, creative elements in these legal systems.

Rhetoric also plays a role in our own system (O'Barr, 1981; O'Barr and Conley, 1976), but its importance is largely ignored in the rule-oriented philosophical analysis of what law is all about. Practicing lawyers, however, are vitally concerned with this aspect of law, and the law itself acknowledges the relevance of context in the respect it officially accords demeanor evidence. But the quality of this attention reveals the marginal nature of context considerations. While demeanor evidence can sway verdicts, and the possible implications of such evidence may determine appeals, this aspect of context is not incorporated into the structure of the law in any systematic fashion:

> The courts repeatedly recognize and respect its [demeanor evidence's] importance, yet they are unable to impose any restrictions on its use. A judge or jury member may use the demeanor of a witness as the basis for believing or disbelieving any or all of the testimony. . . . And in doing so, the trier of fact is given no established guidelines to follow (Conley, 1982: 46).

It is only in a few recent studies that the consideration of this and other aspects of context has figured in scholarly attempts to understand the Anglo-American legal system (Atkinson and Drew, 1979; Danet, 1984; O'Barr, 1982: 23-24).

The tendency to divorce context from the structure of laws exists not only in the ideology of the Anglo-American system but also in the way law is practiced. Appellate courts, for example, consider only written records of trials, which are largely devoid of contextual variables (i.e., not only elements of speech such as speech style, pitch, accentuation, but also nonlinguistic cues such as gesturing or dress).[27] For purposes of appeal it is assumed, although it clearly need not be the case, that all contextual variables favored the party who prevailed at trial. But this assumption may be weak or strong according to how the court reads the context-cleansed record. Thus, one case may be affirmed where the objective evidence is weak because "the jury saw the witnesses," but another case may be reversed without any mention of the presumed probative value of unrecorded context variables.[28] The approach that most law schools take in educating their students similarly denigrates the importance of context. Most law students spend the bulk of their time studying doctrinal texts or appellate cases. The practices of courtrooms and law offices are generally not subjects of formal training.

Thus, in theory and to some extent in practice Anglo-American legal ideology contrasts the structured system of "the law" with unsystematizable contextual factors that inescapably surround legal action. Typically the latter is at best noise in the system and at worst tends to subvert it. Other cultures, as we have seen, take a more holistic view of legal action,

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[27] Conley *et al.* (1979) point out that the law of evidence itself has always emphasized content (elements that can be studied without regard to courtroom context) over form:

> Ultimately, sensitivity to language variations might be incorporated into the law of evidence itself. The primary concern of legal rules of evidence has always been with threshold questions of admissibility. Once the elements of admissibility have been met, however, the form in which evidence is presented is subject only to very broad constraints. Arguably the law cannot be faithful to that purpose if it ignores elements that, in the eyes of the jury, are as significant as factual reliability. Should a witness be held incompetent, for example, if he or she cannot present testimony in a style that will receive an unprejudiced hearing? (Conley *et al.*, 1979: 1398-99).

[28] We are not suggesting that, given the function of appellate courts in our system, the situation could be otherwise. But appellate court judges without trial court experience might well be insensitive to potentially significant nuances in the record on appeal. In any case, we want here simply to emphasize a difference in cultural perspective.

incorporating the ongoing creativity of speech into the core of their conception of a system of law. The Anglo-American preference for abstracted system rather than an in-process social discourse model of legal action is most clearly revealed in the tendency to perceive rules as part of a fixed system that can be "applied" to statically conceived "facts." But as the work of Rosen, Comaroff and Roberts, and many other anthropologists reveals, this perspective is neither a fixed nor universal feature of the concept of law (e.g., Bohannon, 1957; 1963; Fallers, 1969; Gluckman, 1955; Moore, 1978).

The basic point is well known. Law does not function in the same way across cultures, across time, nor even across different segments of one society. A general analysis of "law" which, like Hart's, focuses upon rules and prerequisite conditions, paying minimal attention to ongoing legal creativity, misses the important variation along the rule-dominated versus creative dimension, which differentiates law within and across sociocultural contexts.

## III. LANGUAGE STRUCTURE AND WESTERN LEGAL IDEOLOGY

If we are correct, the Western folk notions of law and language that are exemplified in the work of Hart and Searle are skewed or biased in the sense that even for the West they substantially distort what law is all about. We must now address the question of why this has occurred.

We have seen that Hart assigns creativity to power-conferring rules: "The remedy for the *static* quality of the regime of primary rules," he says, "consists in the introduction of what we shall call 'rules of change' " (1961: 93). This formulation, as we have pointed out, neglects the important creative input of social process. Hart's power-conferring rules merely define the prerequisite conditions under which certain actions will be seen as creating specific institutional facts such as promises, orders, manslaughter, and the like. Law, as we have noted, makes explicit what in ordinary speech is left implicit and presupposed (cf. Silverstein, 1979). For example, if an official at a ship christening ceremony smashes a bottle on a ship's hull and says, "I christen you Queen Elizabeth," the christening is an institutional fact that has been created by the official's speech and actions—a process. If a christening of this sort were to be regulated by law, categorizing rules would specify the minimum personal qualifications of the official,

whether the bottle need be broken, whether it must have contained champagne, etc.

We have also seen that the linguistic practices of ordering, promising, agreeing, offering, and accepting have created a financial and commercial world consisting of semiotic persons (corporations) and property (bills, notes, stocks, bonds, etc.). Why does this world appear to us as a pre-formed and static reality? Though we know we have created such a world, having created it, we now assume it exists "out there." We no longer recognize that we continue to create and constitute it by financial, commercial, and legal discourse. Thus, the creativity of promises and orders becomes objectified in the form of semiotic objects—i.e., bills and notes. The practice of negotiating promissory notes, for example, contributes to the constitution of the financial world through legal discourse, yet, because promissory notes become objectified, the ongoing creativity of this discourse has been lost to us. Further, the objects we have created soon become accepted as "things-out-there"—and, as in our example, used as the basis of new financial systems, such as paper money and the banking system.[29]

Hart's theory of law emphasizes elements that are abstracted from the actual process of ongoing social interaction and so downplays the role of social context. In this respect we believe that Hart's theory reflects a subtle bias that permeates the Western legal system. While other cultures frequently look to the actual dynamics of contextual interaction for underlying "truths," the Western system, in its appellate courts, in its law schools, in the way its law-makers talk about the law, contrasts a system of rules with unanalyzable contextual factors. This viewpoint downplays, in the language of semiotics, the "pragmatic" or context-bound elements.

Semioticians have often divided the study of signs and their meaning into quite distinct realms. "Pragmatics," on the one hand, studies the way in which signs derive meaning from their contexts (e.g., the phrase "that chair" has a meaning that is not discoverable without knowing the particular context in which it

[29] Note in our discussion of Whorf below the similarity between the objectification whereby abstract "time" is rendered countable into discrete units (i.e., days, hours, minutes), and the objectification whereby abstract "value" is divided into discrete units (i.e., dollars and cents). In fact, a true "objectification" is carried through here when the abstract units ("dollars") are concretized, and semiotic *objects* (dollar bills) are created. A full discussion of this sort of objectification involves complexities that we shall not explore here.

is used). "Semantics," on the other hand, studies the meaning that signs have apart from any particular context (e.g., the core meanings of words such as "peace" and "freedom" are thought to remain largely the same across changing speech contexts). The concern for pragmatics is a concern for language as it *functions*, or performs, in social processes (cf. Bar-Hillel, 1954).

Of particular importance to the pragmatic functioning of language are those signs that stand for objects only by virtue of spatiotemporal contiguity; they actually point to something in the speech situation. These are the signs that C.S. Peirce called "indexes." Indexes can depend upon the speech context in different ways. Thus, recent work by Silverstein (1976; 1979) characterizes indexes as falling along a "sliding scale" of "creativity." At one end of the scale, we have the less creative indexes, which presuppose the aspect of the speech context to which they point (and hence are called "presupposing" indexes). The word "that," for example, presupposes the existence of the thing to which it refers. Furthermore, the thing to which "that" refers exists in the speech situation whether or not the speaker actually chooses to point it out. In contrast, the more creative indexes point to aspects of the speech situation the existence of which cannot be presupposed or assumed apart from the indexes that point them out. For example, indexes of speaker-hearer status relations (e.g., the use of second-person plural pronomials to convey deference in languages like French and Italian) are creative; their use can actually create a social parameter of the speech interaction (Silverstein, 1979). In the absence of such forms, it is not clear that the "thing" that they index—here, a social relation between speaker and hearer—would exist.

Similarly, in the case of a promise, we can say that the utterance "I promise" creates a new social relation between speaker and hearer that could not have existed apart from the utterance. At the same time, however, it has some of the characteristics of a presupposing index in that a successful promise must also conform to certain prerequisite conditions in order to be acceptable. This sort of multifunctionality characterizes most speech. The neat divisions into which we can divide speech conceptually are largely heuristic. In many cases the same language performs both pragmatic and semantic functions, often combining various kinds of indexicality and other modes of signaling. Our task is usually to analyze to what degree and in what ways (rather than whether) these functions combine. In the case of the utterance "I promise," we

find indexicality in the pronoun "I," which at once points to or locates the speaker and establishes his/her role in the speech situation. The phrase "I promise" further indexes the very act of speaking; *in speaking* these words, the speaker simultaneously performs a speech act and names or labels the act performed—i.e., a promise.

While phrases such as "I promise" (what linguists call "performatives") both rely on presupposable conditions and create new social parameters of the speech situation, Hart's analysis of the promise focuses only on meanings that foreseeable, statically conceived aspects of context give to language. He ignores the potential of language to redefine or alter that context. Hart approaches the fact that promises create obligations for promisors by focusing upon the prerequisite conditions—i.e., "if words are used by appropriate persons on appropriate occasions." And again:

> Thus behind the power to make wills or contracts are rules relating to capacity or minimum personal qualification. . . . Other rules detail the manner and form in which the power is to be exercised, and settle whether wills or contracts may be made orally or in writing (Hart, 1961: 28).

Because he focuses on only those categorizing (or "constitutive") rules that are of this type, Hart understands the ongoing creative process whereby actions and cultural categories are linked only as a reflex of deductively applied rules. Moreover, in analyzing this creativity Hart further emphasizes the prerequisite rather than the contingent, processual aspects (as in his analysis of creativity in secondary private power-conferring rules). The situation is similar with respect to Hart's attempt to separate rule and process. Within "the vast, central areas of the law" rules dominate process. Because rules, for Hart, specify the important contextual limitations in advance of actual happenings, they can be and are deductively applied. The interaction of events—that is, processes—and their interpretation by lawyers through rules are important only "at the fringes" of the law.

What is the basis for this tendency to see contingent parameters as an unproblematic backdrop of legal action, and for the preference for a deductive model that attends more closely to rule than to process? Silverstein (1979) has proposed that folk ideologies of language use involve a process of "objectification," wherein linguistic ideology and language structure interact dialectically. The emphasis on prerequisite contextual conditions in Western jurisprudence corresponds to

a similar preoccupation within Western theories of how language functions contextually (that is, "pragmatically"). Since legal theory is a form of discourse, necessarily using language as its medium, then perhaps we can trace a relationship between the structure of our language and our legal theories.[30]

Following Silverstein (1979), we can distinguish two sorts of linguistic ideology—an ideology of how language functions semantically to refer to and make predictions about an external reality (reference) and an ideology of how language functions pragmatically in social contexts to produce social ends (performativity). Whorf has suggested that the first, or semantic, function of language is systematically related to (though not necessarily an accurate reflection of) grammatical structure. He outlines a process of "objectification" by which speakers construct a vision of a reality from patterns in their language:

> We say 'ten men' and also 'ten days.' Ten men either are or could be objectively perceived as ten, ten in one group perception—ten men on a street corner, for instance. But 'ten days' cannot be objectively experienced. We experience only one day, today; the other nine (or even all ten) are something conjured up from memory or imagination. If 'ten days' be regarded as a group it must be as an "imaginary," mentally constructed group. Whence comes this "mental pattern" . . . , from the fact that our language confuses the two different situations, has but one pattern for both. . . . Our tongue makes no distinction between numbers counted on discrete entities and numbers that are simply "counting itself." Habitual thought then assumes that in the latter the numbers are just as much counted on "something" as in the former. This is objectification (Whorf, [1978] 1956: 139-40).

Thus, the easily recognized, "overt" patterns of a language are taken as accurate one-to-one reflections of reality out "in the world." This relation between structure and native theories of language does not mean that folk theories contain adequate analyses of the structure of language. Rather, it means that when people think about the way they use language to refer to "objects" in their social world, they focus upon the most accessible parts of language structure—typically "chunks" of

[30] If the legal system is a nexus where many key Western institutions come together through legal definitions, this claim implies the possibility of a larger theory of the relation between language and social-institutional reality in general—in the West, at least.

language that come already segmented (as words, phrases, etc.)—and project from them categories that are assumed to "actually exist" (Silverstein, 1979: 203). Thus, in our example, "days" are assumed to "exist" just as "men" do.

Silverstein (1979) attempts to apply Whorf's notion of semantico-referential objectification to the question of how language functions socially. His project is to demonstrate a similar relation between the *pragmatic* structure of language and native theories about pragmatics (that is, the way people conceptualize the contextual aspect of speaking). As in Whorf's analysis of semantic reference, the fact that native theories of pragmatics are affected by language structure does not mean that they are accurate. Indeed, it almost guarantees inaccuracy, for the theorizing tends to pick out the crudest, most overt surface patterns of language to form the basis of theoretical reflection and generalization.

Silverstein (1979: 206) discusses two kinds of pragmatic function. The first is the way that language gives those who speak it a sense that it may be effectively used to achieve a purpose or goal. The second is the way established patterns of language actually function to point out (or index) aspects of the context of speech (i.e., relative status of speaker and hearer or how close a particular object in the context of speech is to speaker, etc.). Goals that are the object of the first function—for example, using speech to promise, marry, order, baptize, etc. (socially recognized ends)—are accomplished by using language that also functions in the second way—for example, by saying "I promise," "I pronounce you man and wife," etc.

Native theories about pragmatics by a process of "objectification" attempt to understand the second kind of function in terms of the first. Silverstein's analysis views this process of pragmatic objectification as part of a more fundamental tendency in linguistic ideologies whereby pragmatic systems generally are interpreted *via* semantic and referential principles. The pragmatic function of language and the critical role of context are thus understood only as they are "refracted" through a necessarily distorting lens; the principles governing semantic reference (that is, language as a means for referring to meanings understood apart from considerations of context) are quite different from those governing the pragmatic (contextually structured) system of language. A distinguishing feature of this distortion is the fact that the second kind of function described above (language as it points to or indexes aspects of context more or less creatively) is rationalized in

native theories of language so that it is understood only by analogy to the first kind of function (socially recognized goals accomplished through language).[31] For example, J.L. Austin's (1975) linguistic theory of performativity treats the realm of socially purposive speech acts without any framework for the indexical realm of the contextual. Both Hart and Searle have been influenced by Austin's work.

Silverstein isolates three ways in which this overall tendency manifests itself: (1) through an emphasis on easily perceived surface-level segments of language (words, phrases, etc.), (2) through an emphasis on the way in which such segments function to refer (that is, the way language functions to talk about external reality, as opposed to the way language functions pragmatically to point to social contexts), and (3) through a propensity to explain the first kind of pragmatic function described above (language as socially effective) in terms of less creative (that is, "presupposing") contextual relationships rather than in terms of more creative ones (Silverstein, 1979: 208). In these last two points, an emphasis on semantics—on a context-free regimenting principle of reference—and on presupposing rather than on creative indexicality, can be found the key linguistic bases for the perspective we have described in the theories of Hart and Searle.

In examining creativity, Searle has indeed focused on the constitutive or categorizing rules which connect process and linguistic categories, and thus he attends to a part of the system that has an indexical (i.e., context-dependent) character. But Searle locates that creativity in the constitutive rules themselves. Moreover, when Searle attempts to analyze the speech situation, his focus is on presupposing indexicality—that is, on elements of the speech situation that exist apart from the actual ongoing interaction of speakers. What he fails to do is to consider the creative function of the speech act itself.

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[31] Silverstein describes this analogical process in more precise (albeit more technical) language:

> we can subsume this kind of projection-by-objectification as a particularly obvious factor contributing to a wider phenomenon that underlies native pragmatic ideologies. This is the tendency to rationalize the pragmatic system of a language, in native understanding, with an ideology of language that centers on reference-and-predication. That is, native pragmatic ideology explains or rationalizes about function$_2$ (presupposing/creative indexical effect) by analogically projecting basic structures of reference-and-predication (propositionality) as units of functional$_1$ effectiveness (Silverstein, 1979: 208).

Hart, on the other hand, places creativity in power-conferring rules, largely ignoring constitutive or categorizing rules. Further, his examples of power-conferring rules are the explicit prerequisite conditions that are the legal equivalent of implicit presupposed conditions of speech events.[32] Thus, even *in* its attempt to accommodate creativity, Hart's work misses a crucial structuring that derives from creative indexicality (not from decontextualized rule systems). Moreover, the overall focus upon rules and the attempt to locate creativity in them without attending to process reveals a fundamental bias toward referential principles as opposed to contextual (i.e., indexical, pragmatic) considerations—toward semantic-level principles which supposedly regiment discourse all by themselves and which are discoverable apart from any theoretical consideration of context. By contrast, we see the day-to-day creativity involved as lawyers and litigants fit everyday events to legal categories as a contextually-based structuring process that is at the heart and not at the fringes of the law.

Returning to Searle's formula "X counts as Y in context C," we can say that the Y corresponds with Silverstein's first kind of pragmatic function (the effect that language is aimed at). When we say "counts as," we refer to the meaning that a certain statement or action (X) acquires by virtue of sociocultural interpretation. To say that it only acquires its significance "in context C" is to focus precisely on those elements of the situation that can be presupposed or specified in advance; for example, that an effective will must be in writing and signed by the testator. But such an emphasis fails to consider the creative function of the X itself—that is, the way in which writing "I hereby bequeath" (X) counts as and creates a bequest (Y). Such categorizing legal rules have a particular significance in Western social science because they define and describe vital economic, political, and social categories.

## IV. SUMMARY

If this analysis of language structure and linguistic ideology answers our question of why Hart and others see legal action as

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[32] This is merely a legal variety of the linguists' emphasis on performativity noted by Silverstein. He comments that:

> Creative $\text{functional}_2$ effects in particular are lost to $\text{functional}_1$ rationalization, which is characteristically formulated in terms of presupposing $\text{functional}_2$ relations of speech to context, and $\text{function}_1$ (1979: 232).

defined by an unchanging pre-existing context, it also poses a challenge. For a jurisprudence founded upon our own linguistic ideology is not only misleading as a universal guide to legal systems across eras and cultures; it may be a misleading vision of our own legal system. It is not just that attention to legal or linguistic thought becomes more important if we take seriously the idea that such thought itself has a formative effect. More significantly, if our perspective on legal systems, like our perspective on language, is biased by an underlying "drive for reference" (that is, an understanding based in the structure of reference), we are using a warped analytic tool when we proceed to study the legal system from this perspective. Certainly the lesson from linguistics would seem to be that we need to give added consideration to creativity, to process, and to the role of context in social action. The formulations of Whorf and Silverstein suggest that there may be a connection between the *structure* of language—that is, grammar—and ideologies that are relevant in social process.[33] Our own study further points to the need for added sensitivity to the fundamental creative role of social process, which forges the link between legal rules and events. Thus, a study of language as system can have relevance to the study of law as a social institution.

Our paper has suggested a particular relation between language and Western legal ideology. We have argued that this relation is one in which legal and linguistic processes are objectified or rationalized—that is, rendered static by interpretation through principles that derive from the decontextual structure of language as a system for reference (what we can call a "drive for reference," a general linguistic tendency to regiment explanation according to referential principles). More work is necessary in order to specify more completely the particular sociocultural basis for this relation within the Anglo-American tradition. Proceeding from our conclusions here we can, however, provide a possible sketch of this peculiarly Western variety of objectification. We have seen that in the case of Anglo-American legal theory, we can trace a process of pragmatic objectification wherein the creative contextual function of language (that is, Silverstein's second kind of pragmatic function as it operates creatively) is

[33] We should note that Silverstein's is a cross-linguistic claim for the dialectic between language structure and linguistic ideology. Our study claims only suggestive conclusions for an example from Anglo-American legal ideology; it can be regarded as one Western case study that fits with Silverstein's hypothesis.

understood through either noncreative contextual functionality (that is, Silverstein's second kind of pragmatic function as it operates *via* presupposition) or simply through the first kind of pragmatic function described above (that is, language as speakers perceive it to be effective in accomplishing certain goals). Silverstein (1979) has found examples of this general process elsewhere. What may be peculiarly Western in our case is the particular form this objectification takes when order is imposed by a strict deductive logic (as in Hart's model of rules deductively applied). This particular kind of rationalization, while it fits with the overall trend predicted by Silverstein (wherein the pragmatic or contextual is, in general, semanticized or decontextualized), is a very specific formulation. The broad outline given by a "drive for reference" cannot adequately explain it. Instead, we must look for some particular sociocultural basis for this insistence on a deductive decontextualized regimentation wherein a system of definitional equivalences[34] provides the guiding framework, and whereby legal process becomes simply an instantiation of rules. Both Weber (1978), with his notion of increasing rationalization in capitalist society, and Lukács (1971), who combines Weber's insight with a Marxian conception of "objectification," provide suggestive starting points for such a search.

In summary, we would like to emphasize that this paper has dealt only with a small portion of Anglo-American legal ideology as embodied in the work of a key theorist. Further work is necessary, both in order to place this strand of legal ideology in the wider context of Western legal ideology in general, and in order to explore the relation between legal ideology and the actual legal system. Finally, we wish to note that despite the "warping" that our analysis disclosed, Hart's work itself corrected a bias in jurisprudence based on a faulty linguistic analogy—that of Austin's "command." Our own work owes no small debt to the foundation from which Hart's jurisprudence allows us to build.

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[34] What a linguist would call "metasemantic equations."

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